APPENDIX

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IN THE SECOND JUDICIAL DISTRICT
FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Case No. CV 93-04250
Dept. No. 8

DEBRA BARTGIS,

Plaintiff,

vs.

NORTH AMERICAN LIFE & CASUALTY COMPANY, and ALBERT H. WOHLERS & CO.,

Defendants.

DEFENDANTS ALLIANZ AND WOHLERS' MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL AND/OR TO ALTER OR AMEND THE JUDGMENT

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C. The Amount of the Award for Punitive Damages was Excessive.

A review of the circumstances Nevada courts rely on to determine whether a punitive award is excessive compared to the facts presented to the jury, demonstrate that as a matter of law this award cannot stand. The jury's verdict was a result of passion and prejudice, which is not permissible. The amount awarded for punitive damages was excessive. The standard for the review of an award

of punitive damages was established in the case of *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 746 P.2d 132 (Nev. 1987). In *Ace Truck* the Nevada Supreme Court stated that a jury does not have "unbridled discretion" in setting the amount of punitive damages. *Id.* at 134. The Court recognized the need to establish standards to determine the reasonableness of punitive damages and set an upper limit. *Id.* at 13-35. The Court concluded:

> [W]e declare the following standard for evaluating excessiveness of punitive damages: Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case. If the awarding jury of judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.

Id. at 136-37. Under the foregoing standard, the court is to determine "what is fair, just and reasonable" for punitive damages under the circumstances. *Id.* at 137.

The *Ace Truck* court provided guidance as to the factors to be considered when determining if an award is excessive. The Court stated:

> In arriving at the ultimate judgment of where excessive begins, courts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can properly imposed in a given case. Relevant circumstances include such matters as the financial position of the defendant, culpability and blameworthiness of the tortfeasor,

> vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of the kind.

Id. at 137. The factors adopted in *Ace Truck* have since been followed by the Nevada Supreme Court. *See Republic Ins. Co. v. Hires*, 810 P.2d 790, 792 (Nev. 1991); *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 199 (Nev. 1989).

The Court in *Kellar vs. Brown*, 108 Nev. 273 (1985) reviewed the ratio between the amount of compensatory damages and punitive damages. The Court noted that defendants in this case attempted to settle the matter at an earlier stage, and further observed that "the evidence might also be interpreted in a more charitable light" with respect to defendants' conduct. *Id.* at 274. The Court concluded that for those reasons it believed that "a punitive award of more than five times respondent's actual damages is disproportionate and unnecessary to deter appellant's from like wrongdoing in the future." *Id.* at 274.

The circumstances of this matter do not in any way justify the extraordinary award. Defendants did not act in a purposeful manner to hurt anybody. As discussed above, Allianz insured this group as an accommodation to the group that otherwise would have had no coverage whatsoever. The material and policy was drafted quickly to avoid any gap in the group's coverage. The November letter which does not reference the changes in the coverage was sent to a group that had already lost the MONY policy—defendants were not seeking to defraud anybody. There is no evidence whatsoever that Wohlers sent this letter to induce reliance for its own benefit or the benefit of Allianz.

Allianz acted under a reasonable belief that its actions were justified. Allianz knew that the application of the ancillary charge maximums was in litigation in another state. That litigation was resolved, not on a question local of law, but on simple interpretation of the policy language and a finding that it was not ambiguous. In short, Allianz is now being punished by this jury for $7.5 million for conduct which the trial court and appellate court in Texas found to be completely blameless.

Bartgis suffered minimal harm and has not adduced any evidence, except for her own, "after the fact" statements, that she relied on representations by the defendants. There is no evidence that she suffered substantially. Circumstances simply do not justify this outrageous award that is one thousand times the benefit at issue.

The award does not in any way comport with the purposes of punitive damages. The proper end to punitive damages is to punish and deter wrongful conduct. *Midwest Supply, Inc. vs. Waters*, 89 Nev. 210, 510 P.2d 876 (1973). In this matter, the policy at issue is no longer in existence. There is no future conduct to deter under this policy. Allianz, as soon as it learned of plaintiff's complaint, immediately offered to settle the dispute by payment of benefits—without regard to the maximums stated in the policy—plus attorney fees, which offer was rejected.

Furthermore, the award is excessive as it goes far beyond any reasonable punishment or detriment. The testimony was that plaintiff's premium was $91.00 for three months and $107.00 for twenty-seven months. Thus, for the entire time period of two and a half years that plaintiff was insured under the Allianz policy she paid premiums of $3,162. There was testimony that the entire group nationwide was between 600 and 700 people. As-

suming an average of 650 participants and assuming that each of them paid the same premium as plaintiff, the total gross premium for the whole group for the entire time period that the policy was in force is $2,055,300. The total punitive damage award here is roughly four times the total gross premium received—not the profit, not the net profit—but the *total* premium received throughout the existence of the group policy, which policy in fact lost money.

Under Nevada law, punitive damages are required to be an amount suitable to punish or deter; to bear some reasonable relationship to the actual damages and to bear a relationship to the blameworthiness of the alleged wrongdoing. Here Allianz stepped in to fill a void in a groups' medical insurance, lost money in so doing, but, based on this jury's apparent anger, is alone being assessed a fine of 3½ times the total gross premium.

A review of the facts of this matter evidences that defendants' conduct and plaintiff's harm pales in contrast to the facts in the seminal case of *Republic Insurance Company v. Hires*, 107 Nev. 317, 810 P.2d 790 (1991) in which the Supreme Court reduced a $22.5 million punitive damages verdict to $5 million. The facts in the instant matter are *nothing* like the facts in *Hires*. In *Hires* the defendant insurer was engaged in a deliberate and deceptive pattern of underpaying its low income insureds in a systematic matter to oppress insureds on over one million claims per year. The Supreme Court observed that this pattern would amount to a fraud of one hundred million dollars per year on its policyholders. Justice Springer depicted "how awful" the insurer really was in its dealings with its insureds as follows:

> As the trial court concluded, Republic was guilty of "conscious wrongdoing" and "malicious intent"; but

> what aggravates the wrongdoing in this case is the massive oppression engaged in by Republic and Republic's focus on defeating the legitimate claims of its low income, relatively powerless clientele. What the company was doing was to underpay its claimants on an "across the board" basis by starting "negotiations" with claimants at sixty-five percent of the true value of the claim as assessed by the company itself, and then negotiating downward from there. Shortchanging its policyholders was, according to the trial judge, "the unqualified policy of Republic, particularly with regard to lower and middle income policyholders, who are less likely to dispute Republic's position." There is evidence to support the conclusion that this oppressive policy was employed on over one million claims per year. The amount "shaved" off (to use a term coined by one of the witnesses) of Hires' legitimate claim was around $5,800.00. If, for example, only a trifling $100.00 were shaved from each of a million claims each year, we would have a staggering fraud on the company's policyholders of $100 million per year. This kind of fraud, this kind of oppression is indeed deserving of punishment.

None of this activity occurred in this matter. The Allianz policy was a one time policy that was employed to accommodate a group of insureds who would otherwise would have no insurance. The policy was put in place quickly and is no longer used today. Allianz lost money on the policy. Benefits were paid according to the terms of the policy—not "shaved".

Furthermore, the harm suffered by the *Hires* insured is in a entirely different galaxy from the minimal harm suffered by plaintiff in this matter. There was testimony in

Hires that the insured was embarrassed, his kids teased and his family was ostracized as a result of insurers' conduct. The *Hires* plaintiff was openly accused of destroying his own furniture and possessions in an insurance scam. The insured was embarrassed and slandered by this false claim. There was further testimony that the *Hires* insured suffered actual economic harm as a result of the insureds' refusal to pay for full value. In marked contrast, there is no evidence in this matter that the insured suffered any economic harm, and only minimal testimony that the insured suffered at all as a result of defendants' initial refusal to pay certain medical expenses.

If the Supreme Court deems $5 million sufficient to punish an insurer for outrageous, disgusting and evil conduct, it is impossible to justify an $8 million verdict given the facts of this case. Accordingly, this award must be drastically reduced under the standards of Nevada law.

Finally, the financial position of defendants does not justify such an award. As against the Wohlers, the jury awarded a sum exceeding 20% of Wohlers' net worth. This award will in effect cripple Wohlers. The court in *Kahn* noted that an award of punitive damages must be reversed or reduced were the "award appears to be depleting the defendants' assets in an amount and in a proportion far in excess of that which can be said reasonably necessary to punish either defendant or to deter others from similar fraudulent conduct". 103 Nev. at 511. The amount of punitive damages must not be "financially annihilating [to] the defendant".

Phillips v. Lynch, 101 Nev. 311, 704 P.2d 1083 (1985). If the Wohlers in fact were required to pay 20% of their net worth it would be a financial disaster. Given the facts of this matter this award is disproportionate to the degree of harmfulness, intent and the harm

suffered by the Bartgis. Further, it is improper to justify any award of punitive damages by references to other insureds, as Bartgis argued.

As to Allianz, the award of $7.5 million, while "only" 2.5% of this 100 year old company's net worth, is utterly out of proportion to the actual damages suffered by plaintiff as well as the permissible purposes for awarding punitive damages. Allianz insureds hundreds of thousands of people across the nation. It is improper to give significant weight to the financial status of a defendant. *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992). If this one plaintiff is allowed to deplete such a substantial portion of the company's assets, it could be ruinous to the multitude of insureds across the country who rely on Allianz. As discussed above, there is no evidence that the actions in this matter exemplify Allianz' treatments of its insured, and therefore the award should have minimal, if any, real deterrent effect on the Company. Allianz only acted as an accommodation to this particular group of insureds who otherwise would have had no coverage. Allianz lost money on the policy, and the policy was hurriedly put in place for the benefit of the group. A multi-million dollar award is nothing more than an economic transfer of wealth that will glorify and enrich this lone plaintiff at the expense of hundreds of thosuands of insureds who can ill afford to have their premiums possibly raised or have their insurance company be financially crippled.

If there is any doubt as to why insurance costs keep going up, this judgment can leave do doubt.

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